

**Jebsen & Jessen Engineering (M) Sdn Bhd v
David a/l Sandanasamy & Ors**

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL
REVISION NO R2-25-59 OF 2002

WAN AFRAH JC

3 NOVEMBER 2003

Administrative Law — Exercise of administrative powers — Judicial review — High court — Whether can interfere with findings of the Industrial Court — Whether can reduce award of back wages — Industrial Relations Act 1967 s 30

Administrative Law — Exercise of administrative powers — Judicial review — Industrial Court — Award — Error of law did not occasion great injustice — Arithmetical error — Whether entire award should be quashed

Labour Law — Industrial Court — Procedure — Pleadings — Whether issues outside pleadings could be considered

Labour Law — Employment — Resignation — Whether letter of resignation tendered voluntarily — Whether procured with threat of retrenchment — Whether exercise of retrenchment genuine

The first respondent was in the employment of the applicant since 14 August 1997 as an account assistant and the second respondent joined the applicant as a service supervisor on 10 March 1993. Both the respondents alleged that their last day with the applicant was on the 31 July 1998. The issue of determination before the Industrial Court ('the IC') was whether the letter of resignation of both the respondents were procured as a result of coercion and force and was not tendered voluntarily or as contended by the applicant that since it was in genuine retrenchment situation hence this dismissal was with just cause or excuse and/or the respondents resigned to avoid from being retrenched. The IC concluded that the resignation of the respondents came about at the initiative of the company and that the resignation was not tendered voluntarily and held that there was forced resignation and hence a dismissal. The IC proceeded to award back wages to the respondents. This was the applicant's application for an order of certiorari to quash the award of the IC on the grounds that, inter alia, the IC erred in law and acted without or in excess of jurisdiction.

Held, dismissing the application for certiorari:

- (1) It was important in a case to appraise the whole evidence as it was wrong to take bits and pieces of the award and criticize them. This was in fact spelt out in the case of *Kaolin (M) Sdn Bhd v Samba Sirvang a/l Thanimalai* [2001] 1 MLJ 120. As such, in this case, the court was satisfied that the IC had considered the pleadings and the evidence duly tendered before it (see para 11).

- A** (2) The IC did not commit an error of law in its evaluation and finding of the initial meetings to come to a conclusion that 'it triggers the likelihood of the absence or lack of free will on the part of the employees'. The High Court failed to see how the initial meetings and discussion the applicant had with the respondents when briefing the retrenchment were in compliance with the Industrial Code of Harmony, more so with the company pre prepared termination letter (see para 20).
- B**
- C** (3) The IC was not wrong to find that the company was not suffering losses as it does not tally with cost cutting exercise embarked by the company. If it was true that the position of the respondents were surplus that necessitated the need for retrenchment, then the applicant should have instead retrenched the respondents and pay nothing to them as the respondents were not entitled to any payments. The very action of the applicant in calling for meetings individually and giving them an option of either resigning or be dismissed, was by no stretch of imagination a compliance with the Code of Conduct for Industrial Harmony (see paras 36, 40).
- D** (4) The IC chairwoman had sieved through evidence of both parties and had come to a finding of facts and this reviewing court here will not interfere with the trial court's finding of fact unless they were completely unsupported by any evidence. Once there was evidence to support a finding of fact, the High Court should not interfere into it (see para 23); *Non-metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67 followed.
- E**
- F** (5) Based upon the Federal Court's decision of *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109, if there was a legal basis for an award of back wages, the amount was very much a matter of the discretion which the IC was fully empowered under s 30 of the Industrial Relations Act 1967 (see para 48).
- G** (6) Arithmetical error committed by the IC when it computed the deduction of two and a half months salary of the first respondent as RM 3,000 instead of RM4,000 could be corrected by the High Court without quashing the entire award (see para 50).
- H** (7) Where there was an error of law, if such error did not occasion great injustice, the entire award should not be quashed (see para 55).

[Bahasa Malaysia summary]

- H** Responden pertama bekerja sebagai pembantu perakaunan pemohon sejak 14 Ogos 1997 dan responden kedua bekerja dengan pemohon sebagai penyelia servis sejak 10 Mac 1993. Kedua-dua responden menyatakan hari terakhir mereka dengan pemohon adalah pada 31 Julai 1998. Isu yang perlu diputuskan di Mahkamah Perusahaan ('MP') adalah sama ada surat perletakkan jawatan kedua-dua responden diperolehi secara paksaan dan tidak diberi secara rela atau seperti dinyatakan oleh pemohon kerana ia adalah keadaan pengurangan pekerja yang benar maka penamatan ini adalah dengan tujuan dan alasan
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yang adil dan/atau responden-responden meletak jawatan untuk mengelak dari ditamatkan pekerjaannya kerana pengurangan pekerjaan. MP memutuskan bahawa perletakkan jawatan responden-responden adalah kerana pemohon dan ia tidak diberi secara rela dan ia diperolehi secara paksaan maka terdapat penamatan pekerjaan. MP mengarahkan pemohon untuk membayar tunggakan gaji kepada responden-responden. Ini adalah permohonan pemohon untuk perintah certiorari untuk memansuhkan award MP atas alasan bahawa antara lain MP telah salah dari sisi undang-undang dan telah bertindak tanpa atau dengan bidang kuasa terlebih.

Diputuskan, menolak permohonan pemohon untuk certiorari:

- (1) Ia adalah penting di dalam sesuatu kes untuk menilai keseluruhan keterangan kerana adalah salah untuk menilai sedikit demi sedikit dan mengkritiknya. Ini telah dinyatakan di dalam kes *Kaolin (M) Sdn Bhd v Samba Sirwang a/l Thanimalai* [2001] 1 MLJ 120. Oleh demikian di dalam kes ini Mahkamah berpuashati bahawa MP telah menilai pliding dan keterangan yang dikemukakan padanya (lihat perenggan 11).
- (2) Mahkamah Perusahaan tidak melakukan kesalahan undang-undang dalam penilaian dan keputusannya mengenai mesyuarat awal untuk mencapai keputusan bahawa 'ia bangkitkan peluang untuk ketidakrelaan terhadap pekerja'. Mahkamah Tinggi gagal untuk melihat bagaimana mesyuarat awal dan perbincangan pemohon adakan dengan responden-responden bila memberi maklumat mengenai penamatan pekerjaan adalah mematuhi Kanun Perusahaan bagi Kesejahteraan, lebih-lebih lagi dengan surat perletakkan jawatan yang disiapkan oleh syarikat (lihat perenggan 20).
- (3) Mahkamah Perusahaan tidak salah untuk membuat keputusan bahawa syarikat tidak mengalami kerugian kerana ia tidak besamaan dengan langkah pemotongan kos yang dibuat oleh syarikat. Kalau benar jawatan responden-responden adalah terlebih dan perlu ditamatkan, pemohon sepatutnya menamatkan pekerjaan mereka dan tidak bayar apa-apa kepada responden-responden kerana mereka tidak berhak untuk sebarang pembayaran. Tindakan pemohon memanggil untuk mesyuarat secara individu dan memberi mereka pilihan untuk sama ada meletak jawatan atau ditamatkan, adalah tidak mematuhi Kanun Perusahaan untuk Kesejahteraan (lihat perenggan-perenggan 36, 40).
- (4) Pengerusi MP telah menilai keterangan kedua-dua pihak dan telah mencapai keputusan fakta dan mahkamah kajian semula ini tidak akan masuk campur dalam keputusan fakta mahkamah yang menjalankan perbicaraan kecuali ia tidak langsung disokong oleh sebarang keterangan. Sekali terdapat keterangan untuk menyokong keputusan fakta, Mahkamah Tinggi tidak akan masuk campur (lihat perenggan 23); *Non-metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67 diikuti.
- (5) Berdasarkan pada keputusan Mahkamah Persekutuan di dalam kes *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109, jika terdapat asas undang-undang untuk

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- A** memberi award bagi tunggakan gaji, jumlahnya adalah satu perkara didalam pertimbangan MP mengikut kuasa sepenuhnya yang diberikan oleh s 30 Akta Perhubungan Perusahaan 1967 (lihat perenggan 48).
- (6) Kesalahan kira-kira yang dibuat oleh MP bila ia mengira pemotongan dua bulan setengah bulan gaji bagi responden pertama sebagai RM3,000 bila ia sepatutnya RM4,000 boleh dibetulkan oleh Mahkamah Tinggi tanpa memansuhkan keseluruhan award (lihat perenggan 50).
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- (7) Bila terdapat kesilapan undang-undang, jika kesilapan itu tidak melibatkan ketidakadilan yang besar, keseluruhan award tersebut tidak patut dimansuhkan (lihat perenggan 55).]

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Notes

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 35–58.

For cases on procedure, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1380–1390.

- D** For cases on resignation, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1003–1004.

For judicial review, see 2 *Halsbury's Laws of Malaysia* para [160.059]–[160.069].

- E** For unjust dismissal, see 17 *Halsbury's Laws of Malaysia* para [290.123]–[290.124].

Cases referred to

Abdul Majid bin Hj. Nazardin & Ors v Paari Perumal [2002] 2 MLJ 640 (refd)
Edwards (Inspector of Taxes) v Bairstow & Anor [1956] AC 14(folld)

- F** *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 (folld)

Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 (folld)

Kaolin (M) Sdn Bhd v Samba Sirvang a/l Thanimalai [2001] 1 MLJ 120 (folld)
Non-metallic Mineral Products Manufacturing Employees Union v South East Asia Fire Bricks Sdn Bhd [1976] 2 MLJ 67 (folld)

- G** *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER (folld)

Quah Swee Khoo v Sime Darby Bhd [2002] MLJ 600 (folld)

Southern Bank Bhd v Ng Keng Lian & Anor [2002] 2 CLJ 514 (refd)

Tuan Hj Sarip Hamid & Anor v Patco Malaysia [1995] 2 MLJ 442 (folld)

- H** *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 75 3 (folld)

Legislation referred to

Industrial Relations Act 1967 ss 20,30

- I** *TM Varughese (TM Varughese & Co) for the applicant.*
P Vickneswaren (Kavin Lim with him) (Murugavell Arumugam & Co) for the first and second respondents.

Wan Afrah JC:

[1] This was the applicant's application for an order of certiorari to quash the decision of the Industrial Court Award No 302 of 2002 dated 11 April 2002 and that the Industrial Court ('IC') erred for various grounds which would be subsequently stated.

[2] The parties in this case are Jebesen & lessen Engineering (M) Sdn Bhd ('the applicant') and David a/l Sandanasamy ('the first respondent') and PJacob Simon a/l Chacko Simon ('the second respondent'). The first respondent joined the company on 14 August 1997 as an account assistant and the second respondent joined the company as a service supervisor on 10 March 1993. Both the respondents alleged that their last day with the company was on the 31 July 1998.

[3] In this case, the issue of determination before the IC was whether the letter of resignation of both the respondents were procured as a result of coercion and force and was not tendered voluntarily or as contended by the applicant that since it was in genuine retrenchment situation hence this dismissal was with just cause or excuse and/or the respondents resigned to avoid from being retrenched.

[4] The applicant submitted various grounds alleging that both respondents were not dismissed at all within the meaning of s 20 of the Industrial Relation Act 1967 and further submitted that in the event the IC concluded that both respondents were dismissed, such dismissal was with just cause or excuse by reason of genuine retrenchment situation and not actuated by any act of victimization, mala fide or unfair labour practice.

[5] At the conclusion of the hearing, the IC after hearing and evaluating the testimony of both the respondents, the applicant witnesses and the circumstances prevailing at that material time came to the conclusion that the resignation of the respondents came about at the initiative of the company and that the resignation was not tendered voluntarily. As such, the Industrial Court Chairlady ('ICC') held that there was forced resignation and hence a dismissal.

[6] Before this court, the applicant is now seeking judicial review to quash the IC's award in the following grounds:

(1) The Industrial Court erred in law and acted without or in excess of jurisdiction in that it addressed and considered the issues outside the scope of the respondent's pleadings

[7] Counsel for the applicant applied under this heading as one of the grounds in seeking judicial review but did not really discussed this in his written submission as to what were the exact issues addressed and considered by the IC which was outside the respondent's pleading. However during the oral submission before me, Mr Varughese, the learned counsel for the applicant raised the issue that in the first respondent pleading he said he was the sole breadwinner of the family but in his evidence he told the court that his wife was working. Another issue brought up by the learned counsel was that in

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A the statement of case of the first respondent nowhere in the pleading was it stated that he was threatened or forced to resign. Counsel referred to para 7(a), (b), and (c) of the statement of case of the first respondent.

B **[8]** With regard to the second respondent, Mr Varughese argued that in his pleading the second respondent did not state that he was forced or coerced in tendering his resignation. In fact, the second respondent admitted in court that he was not physically threatened by the managing director. The learned counsel further contends that in identifying this issues, the IC has gone outside his pleadings.

C **[9]** On this issue, the learned counsel for the respondents argued that the issues were correctly identified by the IC. He subsequently refers to the statement of case of the first and second respondent, para 5 of the statement of case of the first respondent, read as follows:

D On 31 July 1998; at about 4.45pm, the first claimant was called by one Ms Angie, the credit controller for a meeting at the director's room. During the said meeting, the first claimant was asked to resign or face dismissal by the director, one Mr Tai Tiong Tai. However, the claimant refused to resign. Then he was given a copy of letter dated 31 July 1998, stating, inter alia, that his services were terminated as result of his position being redundant.

E **[10]** With regard to the second respondent, the issue of threat has also been pleaded in para 6 of the second respondent statement of case which is cited below:

F On 8 July 1998, at about 9.15am, the second claimant was informed by one Mr Anthony Thanaraj, the Service Executive of the Company to attend a meeting at the managing director's room. During the said meeting, which were attended by the managing director, one Mr Andrew Tan, the said Mr Anthony Thanaraj and one Ms Catherine, the personnel manager, the claimant was told by the managing director that he wanted the claimant to resign and preferred economic downturn which was allegedly affecting the company as the reason for asking the claimant to resign. The said managing director threatened that if the claimant refused to resign, he will eventually be forced out of employment. The said managing director further promised the claimant that the company will give him a very good testimonial and a sum of RM1,024.67 as separation benefit as consideration for the claimant's resignation.

G **[11]** From the bundle of the pleading, I am unable to agree with Mr Varughese on his first said ground as it is important in a case to appraise the whole evidence as it is wrong to take bits and pieces of the award and criticize them. This was in fact spelt out in the case of *Kaolin (M) Sdn Bhd v Samba Sirvang a/l Thanimalai* [2001]1 MLJ 120. As such, in this case, I am satisfied that the
H IC had considered the pleadings and the evidence duly tendered before her.

I *(2) The Industrial Court committed error of law in its evaluation and findings on the initial meetings and discussion the applicant had with the two respondents when briefings on their retrenchment were held which were in compliance with the code of conduct for industrial harmony. The Industrial Court completely misinterpreted and fundamentally misdirected itself on the said briefing sessions by concluding that 'it triggers the likelihood of the absence or lack of free will on the part of the employees ...' (see p 9 of the award)*

[12] Pertaining to this ground, counsel for the applicant submit that the company had taken time to consult both the respondent in advance on the adverse economic situation of the company before announcing to them that they have to be retrenched and have complied with the guidelines, paras 20–24 of the Code of Conduct for Industrial Harmony. He further submit that the first respondent, after the briefing sessions on 31 July 1998 and 3 August 1998 went home to think over and to make up his mind whether or not he wants to tender his resignation. On 6 August 1998 (or on 7 August 1998 as the first claimant states), ie about seven days after first briefing session, he came to the office with his pre-prepared letter of resignation and handed to the personnel manager.

[13] On 9 July 1998 at about 10am, the second respondent was called for a briefing session by the management when it was explained of the company's adverse business and financial situation and the need to retrench some staff including the second respondent who was the last person to join the service. The briefing session took about $\frac{3}{4}$ to one hour. It was a cordial and orderly meeting. The second respondent then went back to his office and after the lunch break, he wrote his resignation letter in his own handwriting and handed to his immediate superior which was duly accepted by the company.

[14] Both the respondents thus tendered their resignations and collected the monetary benefits. They made no protests and subsequently lodged their complaints under s 20 of Industrial Relations Act 1967 to the effect that they were dismissed without just cause or excuse.

[15] However, he submit that the ICC had already arrived at a concluded prejudicial view on these issues at the commencement of its evaluation of evidence. Counsel quoted the relevant passage of the award:

When looking at the evidence adduced, the court finds that it is undeniable that both the claimants were called for meeting by the company management where the management initiated the move to have the claimants to leave the company. This factor by itself put the company into unfavourable light when considering the issue of voluntariness of the resignation. It triggers the likelihood of the absence or lack of free will on the part of the employees and in this case both the claimants.

[16] To rebut the applicant's contention, counsel for the respondents submit that the IC had found that both the respondents were called for a meeting by the applicant's management. The ICC was of the opinion that it had triggered the absence or lack of free will on the part of both the respondents. The ICC had taken into account that the meeting between the management and the first respondent on 3 August 1998 was for more than an hour and then followed with another meeting on 3 August 1998. This in itself shows that the first respondent was not willing to leave the company.

[17] The company had even went to the extent of handing over a termination letter dated 31 July 1998 to the first respondent at the meeting on 3 August 1998. This in itself was a threat to the first respondent of the consequences if at all he refuses to resign. The second respondent was also called for a meeting by the company's management on 8 July 1998 and on the said day itself, he had submitted a resignation letter.

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- A** [18] The applicant contention that the said letter was submitted voluntarily and without coercion was not accepted, as the court found that it is reasonable to expect an employee to protest when he had been selected to be retrenched. The court also found it believable that the second respondent had protested against the managing director's decision to dismiss him and this went unheeded.
- B** [19] As such, counsel for the respondents submit that this finding was a result of careful evaluation of the evidence of the witnesses as such the findings cannot be disturbed. With regard to the issue of that the IC had lost sight of the provisions of paras 20–23 of the Code of Conduct for Industrial Harmony, learned counsel for the respondents argued that the meetings held between the management and the respondents were not discussion on the averment of reduction nor was it an early warning of reduction before it was undertaken. The meeting held between the management and the respondents were to inform them of the company's intention to retrench them if they were unwilling to resign.
- C**
- D** [20] Having heard the submission by both parties, this court is agreeable with the ICC that when the applicant calls the respondents for a meeting, it was done so with the intention to get the respondents to leave the company. I find that the ICC did not commit an error of law in its evaluation and finding of the initial meetings to come to a conclusion that 'it triggers the likelihood of the absence or lack of free will on the part of the employees'. I failed to see how the initial meetings and discussion the applicant had with the respondents when briefing the retrenchment were in compliance with the Industrial Code of Harmony more so with the company pre prepared letter dated 31 July 1998. This issue was taken into consideration by the IC as follows:
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- F** This factors mentioned by the counsel however cannot be accepted wholly. This is because besides the first claimant's testimony that he was being threatened and pressurised, there was also the existence of his termination letter when he met the management on 31 July 1998. This shows that the first claimant was placed under duress.
- G** [21] It is from my observation COW-2 also could not furnish any explanation when questioned as to why both the respondents were not informed about the impending retrenchment prior to the meeting on 31 July 1988 (in relation to the second respondent). Thus, the meeting between the applicant and the respondents cannot be construed as an adherence to the Code of Conduct for Industrial Harmony as alleged by the applicant's counsel.
- H** (3) *Industrial Court erred in law and acted without or in excess of jurisdiction in that it failed to consider and/or give effect to the evidence adduced in court by the applicant but readily accepted the evidence of the respondents/claimants uncritically without testing them against other evidence, and adopted 'I believe him' formula making the award appeared to be one sided*
- I** [22] This case involved the issue of whether there was forced resignation that involved action of the parties which led to the impugned letters of resignation being given by the respondents. Thus, I would agree with the learned counsel for the respondents that the question of credibility and demeanor

of the witnesses testifying to this issue is highly crucial and the best person to decide on this issue would rightly be the trial judge. This principal has been enunciated in the Court of Appeal case of *Quah Swee Khoon v Sime Darby Bhd* [2002] MLJ 600.

If a judge to whom application is made for certiorari inquires into and disturbs findings of fact based on the credibility of witnesses, he does indeed exercise appellate functions. It is important to remember that in judicial review proceedings the High Court must accept as gospel findings of fact made by the Industrial Court based on credibility of witnesses. As was observed by Mohd Azmi FCJ in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 ATP 757:

‘In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, were so devoid of any plausible justification that no reasonable person or body of persons could have reached them (see Lord Denning’s judgment in *Griffiths (Inspector of Taxes) v JP Harrison (Warford) Ltd* [1962] 1 All ER 909 at p 916, and judgment of Lord Diplock in *Bromley London Borough Council v Greater London Council & Anor* [1983] 1 AC 768 at p 821; [1982] 1 All ER 153 at p 159; [1982] 2 WLR 92 at p 100).’

It is the ultimate decision of the Industrial Court when looked as a whole that matters. That is the approach suggested by so learned a judge as Mohd Azmi FCJ (as he was then). It is a view plainly binding upon this court.

[23] As to the applicant’s contention that the IC had erred in law by easily accepting the evidence of the respondents uncritically, if so this ground does not fall under the purview of the judicial review. From the record, it is observed that ICC had sieved through evidence of both parties and had come to a finding of facts and this reviewing court here will not interfere with the trial court’s finding of fact unless they were completely unsupported by any evidence. Once there is evidence to support a finding of fact, this court will not interfere into it.

[24] I refer to the case of *Non-metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67 when the Federal Court made this observation:

‘That tribunal was charged with findings of fact, and unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its finding of fact.’

Again, rejecting an application for certiorari against a decision of the Industrial Court, the Supreme Court observed in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 at p 421:

‘It is surely not a case where the Industrial Court had acted on no evidence or had come to a conclusion which on the evidence, it could not reasonably come to.’

Weighing and assessing the evidence of the witnesses in the function of the Industrial Court and not that of the High Court. It has already been stated earlier that technical rules of evidence do not apply to adjudicatory bodies which can accept evidence of

- A some probative value. The reliability and admissibility of evidence are matters to be decided by the decision-maker. In case a finding of fact is based on evidence of no probative value, it may be quashed as perverse through certiorari by the review court.

- B (4) *The Industrial Court erred in law in that it ought to have concluded that the resignation letter by the first respondent which he wrote while in his house six days after the alleged threat on 31 July 1998 was a voluntary conduct and cannot constitute in law an act arising from coercion, force, threat and/or duress (which in law ceased to exist over the six days delay). Further the respondent admitted in court that the applicant company did not threaten him in any manner*

- C [25] Counsel for the applicant submit that the first respondent's resignation letter tendered on or about 7 August 1998 was indeed voluntary. This was because the first respondent made this letter of resignation in his own handwriting when he was in his house. With the lapse of over six days and having written this letter in his house, he cannot be writing it involuntarily or with threat.

- D [26] Under this heading, I am unable to agree with the applicant's counsel that the ICC ought to have concluded that the first respondent which was written six days later from his house should constitute to be a voluntary conduct. I note that the ICC in her award had this to say:

- E This is because besides the first claimant's testimony that he was being threatened and pressurised, there was also the existence of his termination letter when he met the management on 31 July 1998. This shows that the first claimant was placed under duress. As to increased benefit given by the company, the first claimant denied asking for it. According to him, this was offered to him in return for giving the company a backdated letter of resignation. This testimony of the first claimant was probable in view of the fact that it was the company's witness (ie COW-2) that called him in his house. These factors such as the availability of the first claimant's termination letter during the first meeting itself and the giving of an increased benefit tend to throw a very unfavourable light to the company's contention that the first claimant's backdated letter of resignation was given voluntarily by him.

- G Furthermore, with the explanations given by the first claimant as to why he submitted the backdated letter of resignation, it is reasonable to conclude that there was coercion on the part of the company to obtain his resignation and that it was not given voluntarily. His explanations which have been accepted by the court were that they had been told by the company that his position was redundant and that he would be given a 21/2 months salary which he needed in view of his wife was about to give birth to his first child.

- H [27] From this passage, it can be deduced that the ICC was crystal clear that the resignation by the first respondent was not voluntarily even though was written six days later.

- I [28] On this point, I find it difficult to comprehend how the first respondent could have voluntarily resigned when he had remained unemployed until November 1998 and was later employed with lesser salary and the fact that his wife was about to deliver their first child at the point of time.

(5) *The Industrial Court erred in law in that it misdirected itself in law when it concluded that the second respondent's resignation was involuntary and/or forced on him having regard to the following evidence in court*

- (a) second respondent tendered his resignation at least four hours after the meeting on the morning of 8 July 1998;
- (b) the resignation letter was written in his own handwriting at his own desk;
- (c) the second respondent's own admission in court that he was not threatened physically or otherwise;
- (d) second respondent was aware of the six staff out of 13 in his department left in the immediate past and no post were filled.
- (e) if his resignation were in fact involuntary/forced, it would be reasonable for him to address a letter very soon to the employer company placing on record his protest: but no such protest letter was ever sent in this case.

[29] Under this heading, counsel for the applicant argued that as for the second respondent, the company had a briefing session with him on 8 July 1998 at about 9.15am in the managing director's office. The company explained to him the company's economic situation and the need for his retrenchment. At this instance, he was given the option for voluntary resignation. The meeting was cordial and there was absolutely no threat exerted. The second respondent went to his office and after the lunch break, he tendered his resignation letter. The second respondent had enough time to consider before tendering his resignation. He was not physically restrained. He wrote his letter after going back to his office after the meeting at 9.15am, that was after the lunch break. It is reasonable that one should send a letter of protest if there was a forced resignation obtained from the second respondent. But there was no such protest during the period 8 July 1998 until the court hearing in May 2001. There was no mention of any protest against the decision of the managing director in the statement of case but mentioned of a protest in the witness statement filed during the hearing.

[30] In retrospect to the applicant's argument that the above evidence was completely disregarded by the IC thereon; concluding that there was force resignation and hence a dismissal instead of genuine retrenchment exercise was without merit. For it was noted that the Industrial ICC had this to say:

the second claimant in his statement of witness (marked as CLS-4) stated that he protested strongly against the decision of the managing director to dismiss him but his protest went unheeded. This statement of the second claimant is believable and acceptable since it is reasonable to expect protest from an employee when he has been asked by the management of the company to leave the employment when he has not committed any wrong. The same reaction would also be displayed when an employee is told that he has been selected to be retrenched. Therefore in this case, the company had not convincingly and sufficiently rebut the second claimants' evidence that his resignation was given involuntarily.

- A** [31] It does seem to this court that the ICC had given enough consideration and had weighted both the facts and event to come to such conclusion. Another argument raised by the applicant counsel before me was that in the award it was stated that because of company's promises and offer of inducements, the second respondent cannot reasonably be said to have tendered his resignation voluntarily. He further submit that the so called promises/
- B** inducements are not even capable to persuade even an illiterate or immature person to tender his resignation letter. If the IC had bothered to evaluate critically the so called inducements and the strong background of the second respondent it would not have come to the conclusion as it did.

- C** [32] On this issue, I am of the opinion that the second respondent although an educated person was placed in such a predicament and was trapped in win or loose consideration had reluctantly and relently abided to such promises. I fail to see how the effect of that evidence constitute a non-direction amounting to misdirection of law.

- D** (6) *The Industrial Court erred in law and acted without or in excess of jurisdiction by failing to consider the applicant's oral and documentary evidence adduced in court with regard to the undisputed and substantial reduction in the volume off business, operating loss and substantial reduction of employees, from 1997 to 1998. The court took into account irrelevant considerations and unlawfully rejected applicant's material evidence. The court made unwarranted deductions based on faulty judicial reasoning. It made conclusions based on insufficient judicial appreciation of the evidence adduced during the trial*
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[33] The company's statement of its financial woes and in the audited 1998 and 1999 profit and loss accounts that were adduced in court had been scrutinized and evaluated by the ICC then so as to determine whether:

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- i) the company was in economic difficulties;
 - ii) the retrenchment of employees was warranted and in good faith.

- G** [34] Here, the learned ICC had taken notice that there were sum increase in the following despite the operating loss and turnover of the company's business:

- (a) Directors higher emolument in 1998 (RM615,208) compared to year 1997 (RM496,586);
 - (b) Benefit in kind obtained by the directors had increased from RM14,706 in 1997 to RM17,285 in 1998;
 - (c) Increase in stock in 1998 (RM3,190,616) compared to 1997 (RM580,336).
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- I** [35] Where the IC had made these findings, the applicant counsel objected and commented that it is also to be noted that the IC in its award made completely unjustified and irrelevant attack on the company on the marginally increased amount of directors emoluments and benefits in kind in 1998 due to full time employment as director and at the same time giving up and reducing director's fees. It further commented (and failed to understand)

on the 'increase in purchase of stock to cater for existing contracts for 1998'. The court failed to understand the matrix of the trading industry and its obligations to honour existing contracts in 1998.

[36] In this instance, I can agree that the ICC was not wrong to find that the company was not suffering losses as perceived to be neither does it tally with cost cutting exercise embarked by the company. Justification to this is also made by the learned respondents counsel in his submission when he said the company had relied on the audited accounts for the year 1998 and 1999 to establish the status of the company. In fact, it was agreed by COW-1 during cross examination that the opinion of the directors in the Director's Report for 1998 and 1999 did not indicate that the company was suffering losses.

[37] Such evidence was enough to suggest that the company 'in all probabilities could not be in such financial distress and facing a bleak future' as put by the learned ICC which concludes her impression of the company as in the case of (i), ie whether company was in economic difficulties. It is also obvious to this court, that the directors of the company had placed their self interest on the wages on their part and had disregarded the social obligation to the employees against the light of the company facing economic difficulties as claimed to be. Such action may be seen as an oppression by the directors of the company on the employees and can be construed as bad faith on the company's operation going forward. Furthermore, this action contradicts the company's steps to cut costs wherever possible and plans of general salary freeze for all in 1998 as pointed by the applicant counsel in that the company took steps to cut costs wherever possible starting from 1997. There was also general salary freeze for all in 1998.

[38] As in (ii) whether the retrenchment was bona fide and valid, it is my observation that this is interrelated with the financial well-being as addressed earlier in (i).

[39] It is to be noted that the counsel for the applicant put before this court the definition of retrenchment:

Retrenchment, in the absence of a statutory definition, may be defined as the discharge of surplus labour by an employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action.

The general principle to justify retrenchment is when it is carried out for profitability, economy or convenience of the employer's business. Services of an employee may become surplus if there was reduction, diminution or cessation of the type of work in the organization. It should be carried out bona fide and not for the purpose of victimization.

[40] If so, the court ponder why there was monetary inducement and promises offered to the respondents cajoling them to resign as an option to retrenchment. This court agrees with the respondents counsel's argument that it is to be noted, that if it is true that the position of the respondents were surplus that necessitated the need for retrenchment, then the applicant should have instead retrenched the respondents and pay nothing to them as the respondents were not entitled to any payments. The very action of the applicant

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- A** in calling for meetings individually and giving them an option of either resigning or be dismissed, is by no stretch of imagination a compliance with the Code of Conduct for Industrial Harmony.

[41] Going further whilst I appreciate that the company had done the following:

- B** i) In identifying both the respondents for retrenchment, the company strictly followed the LIFO principle to comply with the guidelines in the Code of Conduct for Industrial Harmony. There was not even an iota of evidence that the company selected them for retrenchment in bad faith to get rid of the respondents; and
- C** ii) Even though the respondents did not qualify for any statutory termination benefits, being outside the scope of the Employment Act, the company did offer and paid some termination benefits, based on the said Act.

- [42]** However, I stand to lean with the learned respondent's counsel argument put forward that the Code of Conduct for Industrial Harmony encourages prior notice of retrenchment and also the 'ways and means to avoid the need of reducing the workforce'. Nowhere in the said Code provides for the calling of resignation as an option. If the applicant contends that all they wanted to be was magnanimous, then they should have rightly introduced Voluntary Separation Scheme as provided for in the Code. The action of the applicant in calling of the workers and informing them that they have two options (i) resign or face dismissal is not in spirit of the Code of Conduct for Industrial Harmony.
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- [43]** Highlighting the company's adverse situation the applicant had pointed that in 1998, in respect of the first respondent's department, four out of 14 staff were retrenched/left. In respect of the second respondent's department, six out of 13 resigned/left the service and none of the positions were filled. Such evidence was to demonstrate there was a genuine exercise by the company to keep its business afloat. The retrenchment exercise includes both the respondents and there was no mala fide on the company's part as it was the case of redundancy. However, it is to my opinion that the respondents had left the company did so feeling dejected and intimidated more so in the manner they were first approached by the company. On the same breath, the respondent's counsel had argued that these factors alone show clearly that there was no genuine situation of redundancy as claimed by the applicant. What the applicant was trying to do was to force the employees to resign and this cannot be treated as a resort to reduce workforce. The laws of retrenchment clearly provides the manner for reducing of workforce. The very non-adherence to such laws clearly proves bad intention on the part of the applicant. The same thought was expressed by the learned ICC in her statement:
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With the company not been able to show that there was a genuine retrenchment situation, therefore there is no need for the court to go further to consider whether company was bona fide when identifying the claimants as employees to be retrenched.

- I** With no genuine situation of retrenchment existing in the company it therefore follows that the Company's contention that both the claimants resigned voluntarily to avoid the stigma of being retrenched cannot in any way be sustained.

(7) *The Industrial Court erred in law in making the orders on backwages in respect of both respondents at pp 20–22 of the impugned award in that the court failed to apply the principles established by the Federal Court in Dr James Alfred v Koperasi Serbaguna Sanya Bhd [2001] 3 MLJ 529. Further, the computation reveals bias and serious errors detrimental to the applicant. The court also failed to make any reference to the applicant's case authority of Penas Reality Bhd v Chee Yew Kong [2001] 3 ILR 13 which is quite a relevant judgment.*

[44] Under this heading counsel for the applicant submit that in providing the remedy to the first and second respondent the court ordered:

- A total sum of RM 17,700 to the first respondent which is equivalent to 11 months salary for his less than one year service.
- A total sum of RM 44,075.33 to the second respondent which is equivalent to 20 months salary for his one year four months service.

[45] The said sum ordered is manifestly excessive, smacked of punitive damages and too severe a punishment upon the applicant. Having regard to the totality of the circumstances, the award be quashed or substituted.

[46] In *Abdul Majid Bin Hj Nazardin & Ors v Paari Perumal* [2002] 2 MLJ 640, the Court of Appeal substituted in respect of a workman with 9 months service from 13 months to an award of three months salary.

[47] On the issue raised that the back wages awarded by the court smacks punitive in nature, counsel for the respondents argued that it is trite law that if both the issues (ie whether the action of the applicant amounted to a dismissal, and if so, did they have just cause or excuse to do so) are decided in favour of the respondents, then there is legal basis for the court to award compensation.

[48] Based upon the Federal Court's decision of *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109, if there is a legal basis for an award of backwages the amount is very much a matter of the discretion which the IC is fully empowered under s 30 of the Industrial Relations Act 1967.

[49] In this case, the learned counsel for the respondents submit that the ICC's award for remedy is deemed fit and proper in this case and cannot be categorized as punitive in nature.

[50] However, it was submitted by the learned counsel for the applicant at the very outset there was an arithmetical error committed by the ICC when it computed the deduction of two and a half months salary of the first respondent as RM3,000 instead of RM4,000. In this respect, the learned counsel for the respondents agreed that this error can also be corrected by this court without quashing the entire award.

[51] Having read the written submission by both parties, I am of the opinion that there is a legal basis for an award of back wages and the award is very much a matter of the discretion of the IC under s 30 of the Industrial Relations Act 1967. I find no reason to interfere with the quantum awarded by the IC.

- A** [52] As to the arithmetical error committed by the IC, I am of the opinion that this error can be corrected by this Court whereby it is ordered that the deduction of two and a half months salary of the first respondent should now be RM 4,000 instead of the RM 3,000.
- B** (8) *The Industrial Court erred in law and acted without or in excess of jurisdiction in that the conclusions made by the court on the evidence adduced, are so unreasonable and perverse that no reasonable person properly directed itself and asked the correct questions would have arrived at the same conclusions*
- C** [53] Counsel for the applicant lastly submit that in judicial review proceedings, the High Court can disagree with the IC on the conclusions or inferences drawn by the latter from the evidence placed before it on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion. An erroneous inference from proved or admitted facts is an error of law; per Faiza Tamby Chik J in *Southern Bank Bhd v Ng Keng Lian & Anor* [2002] 2 MLJ 553.
- D** [54] On this point, counsel for the respondents submit that the learned ICC had taken into account all facts and had come to findings that are supported by evidences. These findings cannot be interfered with merely because this court may come to a different conclusion on the facts on the basis of the same evidence. I was drawn to the case of *Tuan Hj Sarip Hamid & Anor v Patco Malaysia* [1995] 2 MLJ 442 at p 450:
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- F** It is implicit in the findings aforesaid that, contrary to the submission of counsel for the employer in the High Court, the charges of misconduct made by the employer against the employee had been considered by the Industrial Court and found to be groundless. Such findings of fact are not open to review by the High Court or by this court in the exercise of its supervisory powers except on the principles laid down by Lord Raddiffe in *Edwards (Inspector of Taxes) v Bairstow & Anor* [1956] AC 14 at p 36; [1955] 3 All ER 48 at pp 57–58; [1955] 3 WLR 410 at p 422–423, and applied by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124; [1982] 3 WLR 1096. In our view, upon the evidence before it, the Industrial Court was entitled to make the findings of fact which it did. The fact that we might
- G** have come to a different conclusion is beside the point. Accordingly, it could not be said that any of those findings were perverse.
- H** Furthermore, neither the award nor the reasons therefore, suffered from any jurisdictional error or were they violative of the rules of natural justice or vitiated by errors of law apparent on the face of the record. Moreover, we could detect no trace of bias. We were therefore of the view that a substantive application for certiorari — had there been one — was bound to fail and so, on this further ground also, the order for leave ought not to have been granted.
- I** [55] In conclusion, I reject the applicant's contention on the eight grounds put forward before me and following the principles enunciated in the Federal Court case of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 where it was held that even if there is an error of law, if such error does not occasion great injustice to the entire award should not be quashed.

[56] Lastly, I am of the opinion the award was fair and reasonable. For the above reasons, this application is dismissed with costs.

Application dismissed.

Reported by AG Kalidas

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